

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Section 73.606(b),)	MB Docket No. 04-289
Table of Allotments,)	RM-10802
Television Broadcast Stations; and)	
Amendment of Section 73.622(b).)	
Table of Allotments,)	
Digital Television Broadcast Stations)	
(Columbia and Edenton, North Carolina))	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 21, 2005

Released: July 22, 2005

By the Chief, Video Division:

1. At the request of the University of North Carolina ("UNC"), licensee of non-commercial television station WUND-TV, channel *2, and paired DTV channel *20, Columbia, North Carolina, the Commission has before it the *Notice of Proposed Rule Making*, 19 FCC Rcd 14618 (2004), proposing the reallotment of channels *2 and *20 to Edenton, North Carolina. UNC filed comments and reply comments. A number of parties representing local municipalities filed comments supporting UNC's proposal.¹ Hampton Roads Educational Telecommunications Association, Inc. ("Hampton Roads"), licensee of noncommercial television station WHRO-TV, Hampton-Norfolk, Virginia, filed comments opposing the UNC proposal, to which UNC filed supplemental comments.²

¹ These parties include: (1) J.D. Brickhouse, County Administrator, Tyrrell County Board of Commissioners; (2) Rhett B. White, Manager, Town of Columbia; (3) Marc Basnight, President Pro Tempore, North Carolina General Assembly; (4) Randell Woodruff, County Manager, County of Camden, North Carolina; (5) Donald C. Craft, County Manager, Hertford County; and, (6) Luther C. Copeland, County Manager, Chowan County, North Carolina. The parties state that thousands of North Carolina citizens in the northeastern part of the state who receive their television service via satellite are unable to receive UNC's state-wide broadcast service through their satellite provider.

² Echostar Satellite, LLC ("EchoStar") submitted late-filed comments and UNC filed a response thereto. However, EchoStar's offered neither an explanation for the lateness of its comments, nor a request for their acceptance. Section 1.415 of the Commission's Rules provides that comments in rule making proceedings ordinarily may not be filed after the deadline specified in the Notice of Proposed Rule Making, and Section 1.46 of the Rules states that such deadline may be extended only upon a showing that an emergency situation prevented the filing of timely comments. We find that EchoStar has not shown a sufficient justification to allow acceptance of its late-filed comments, and they, and the response thereto, will be dismissed. See, e.g., *Cherry Valley and Cotton Plant, Arkansas*, 14 FCC Rcd 13544 n.6 (MMB 1999) (late filed reply comments not considered); *Berlin, De Forest, Markesan, and Wautoma, Wisconsin*, 10 FCC Rcd 733 n.3 (MMB 1995) (late file reply comments were unauthorized and not accepted). In any event, the matters asserted

2. UNC filed its petition pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.³ UNC claims that the adoption of its proposal is necessary so that WUND may be retransmitted by satellite to thousands of citizens residing in nine counties in northeastern North Carolina that have been assigned to the Norfolk-Portsmouth-Newport News, Virginia DMA ("Norfolk DMA").⁴ Although these counties receive the over-the-air signal of WUND and the station is carried on local cable systems, about ten thousand viewers receive their television service through satellite service -- more than the number of people that receive WUND over-the-air. However, UNC asserts that it is unable to obtain satellite carriage of WUND on a local-into-local basis in these nine counties because they are assigned to the Norfolk DMA, while Columbia, North Carolina, is assigned to the Greenville-Washington-New Bern, North Carolina DMA ("Greenville DMA").

3. UNC notes that pursuant to the provisions of the Communications Act, as amended by the Satellite Home Viewer Improvement Act of 1999, the satellite carriers offering local-into-local service in the Norfolk DMA are not required to carry WUND because it is licensed to a community (Columbia) that falls outside of the Norfolk DMA.⁵ UNC claims that these nine counties have a population of some 161,000 persons and are located in one of the more rural areas in the State, but because they are assigned to an out-of-state DMA, thousands of viewers are denied satellite access to news, educational, public affairs, and other noncommercial programming offered by UNC's state-wide broadcast service. UNC further claims that its request to change WUND's community of license is an attempt to correct an anomaly created by a private entity's market designations of the FCC's channel allotments.

4. As set forth in the *Notice*, UNC acknowledges that a change in the community of license of WUND from Columbia to Edenton will remove the sole local television transmission service licensed to Columbia. However, UNC argues that because it is not proposing to change the station's transmitter site, operating parameters or service area, the proposed re-designation of WUND's community of license to Edenton is in actuality merely an administrative re-designation. In this regard, UNC explains that WUND operates as a "satellite" rebroadcasting

by EchoStar, to the extent that they are raised by other parties, will be addressed herein.

³ See *Report and Order* in MM Docket No. 88-526, 4 FCC Rcd 4870 (1989), recon *granted in part*, 5 FCC Rcd 7094 (1990) ("*Community of License Change*").

⁴ The nine counties are Camden, Chowan, Currituck, Dare, Gates, Hertford, Northampton, Pasquotank, and Perquimans.

⁵ *Satellite Home Viewer's Improvement Act ("SHIVA")*, Section 338; Pub. Law 106-113, 113 Stat. 1501 (November 29, 1999); See also 47 U.S.C. § 338; 47 C.F.R. § 76.66.

the signal of WUNC-TV, Chapel Hill, which airs the state-wide noncommercial educational network service. It states that WUND has no studios in Columbia and it originates no programming from there, nor will it from Edenton. As a result, it claims that there will be no loss of either existing service or access to local studio facilities for the residents of Columbia or Tyrrell County. UNC further argues that it currently operates two full-power stations in the Greenville DMA (WUNK-TV, Greenville, North Carolina, and WUNM-TV, Jacksonville, North Carolina), and that viewers in Columbia will continue to have access to UNC's programming via local-into-local satellite carriage even if WUND's community of license is no longer in that market. UNC submits that there is widespread support for its the petition among local government officials, citizens, and viewers in northeastern North Carolina,⁶ and that grant of a waiver is consistent with Commission precedent.⁷

5. Hampton Roads, licensee of noncommercial educational station WHRO-TV Hampton-Norfolk, Virginia, filed comments opposing UNC's proposal. It states that unlike UNC, a large public educational institution governed by a state-wide board, Hampton Roads operates as an independent licensee and depends on local fund raising for over 80 percent of its support. It asserts that UNC's proposed move into Hampton Roads market threatens to undermine this support. Hampton Roads also argues that removal of channel *2 from Columbia is contrary to the Commission's change of community of license policy in that it will deprive that community of its sole television transmission service. Moreover, it states that UNC's argument that it is not modifying its facilities and that there will be no loss of existing service is unavailing because the Commission does not equate the removal of a sole local transmission service with the retention of a reception service. Hampton Roads submits that the Commission has previously dealt with nearly the same situation, and denied the request indicating the community at issue possessed "a legitimate expectation of continued local *transmission* service."⁸ Hampton Roads further submits that at no time has the Commission interpreted "reception service" to include a station's potential DBS subscriber base, and that grant of the proposal will only add a station to an already well-served community.

6. To the extent that UNC suggests that there will be no real change of community of license because WUND is not changing its service area, Hampton Roads claims that UNC fails to establish that the entire 4,500 square mile area encompassing the land around North Carolina's Albemarle Sound and portions of southeastern Virginia is a "community" for Section 307(b) purposes. It states that Edenton and Columbia are both the seats of their respective

⁶ UNC has submitted support letters from North Carolina residents in the Norfolk DMA, in the Greenville DMA, and Virginia residents in the Norfolk DMA.

⁷ *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Ardmore, Oklahoma, and Sherman, Texas)*, 7 FCC Rcd 4846 (1992).

⁸ *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Bessemer and Tuscaloosa, Alabama)*, 5 FCC Rcd 669 (1990).

counties and have separate representatives in the United States Congress,⁹ and that the enormous Albemarle Sound actually serves as a physical barrier between the distinct communities located on either side. While Columbia's current population is slightly smaller than the population when the Commission allocated channel *2 in 1964 (810 persons vs. 1099 persons), Hampton Roads observes that Columbia remains the county seat of Tyrell County and contains an active civic population. Furthermore, it states that the net population growth for Tyrell County during the 1990-2000 increased by 7.6 percent -- identical to the growth rate of Chowan County (home of Edenton). Hampton Roads asserts that the Commission has rejected claims of community status where, such as here, a connection has not been shown between the political, social, and commercial organizations and the community in question.

7. Hampton Roads also states that UNC's motivation for abandoning Columbia in favor of Edenton -- to capture additional audience share in the Tidewater Market by invoking DBS carriage for local stations pursuant to SHVIA -- does not warrant abandonment of the Commission's long-established allocation principles. It asserts that UNC's characterization of Columbia as being insufficiently small in size, and being a community comprised of the region surrounding the Albemarle Sound, are "little more than a smokescreen for a grab for additional viewers (and attendant fundraising dollars) in the Tidewater Market." Hampton Roads asserts that the change of community proposal does not "harmonize" DBS service with WUND's Grade B contour coverage because Tidewater-market wide DBS carriage would exceed WUND's Grade B contour.

8. In its responsive comments, UNC states that the adoption of its proposal will enable thousands of satellite customers in the nine-county area of northeastern North Carolina to receive by satellite their publicly funded noncommercial television state-wide broadcast network service. It argues that the public benefit of extending its noncommercial educational state-wide service is sufficient to overcome the loss, for allotment purposes, of this community's sole local transmission service. It also argues that the re-designation of WUND's community of license to Edenton would provide both the Norfolk DMA and the Greenville DMA with an equal number of noncommercial educational television allotments, thus bringing the total noncommercial television services more nearly in line with the Commission's preferred 25 percent benchmark of noncommercial television channels. Finally, UNC notes that more than 1000 citizens as well as county governing bodies in WUND's service area have submitted letters in support of its proposal. These expressions of support, UNC submits, are echoed by previously filed letters from the County Commissions of Currituck, Dare, Pasquotank, and Perquimans Counties, and letters from the Town of Edenton, and the County Managers from Gates, Chowan and Hertford Counties.

9. In its reply comments, Hampton Roads disputes UNC's contention that the change of

⁹ Specifically, Hampton Roads submits that Chowan County, the home of Edenton, and other counties falling west of the Albemarle Sound are grouped into the First Congressional District, while the counties east and south along the coastline belong to the Third Congressional District.

WUND's community of license from Columbia to Edenton is a "purely administrative re-designation" that will have no "real world" effect other than permit satellite access to its signal in certain counties. It rejects UNC's argument that because WUND has no local presence and does not provide any particular level of local service to Columbia as grounds for waiving the Commission's long-standing local allocation principles. Although the Commission has recognized the benefits of centralized operations for noncommercial broadcast stations, Hampton Roads maintains that the Commission has not relieved such licensees of local service obligations. Moreover, Hampton Roads points out that the public endorsements proffered by UNC come from persons who are not adversely affected by the proposed actions or were made by those with an imperfect, if not fully flawed, explanation of what is at stake.¹⁰ Finally, Hampton Roads argues that UNC has not shown that there are 10,000 DBS subscribers who are unable to receive UNC television service. Hampton Roads states that WUND puts a strong over-the-air signal over the entire North Carolina portion of the Tidewater market, and is therefore available to all viewers there.

DISCUSSION

10. As we initially observed in the *Notice* in this proceeding, the removal of the sole local service from Columbia to Edenton would generally not be a preferential arrangement of allotments as contemplated by *Community of License Change*. However, in its *Reconsideration Order*, the Commission stated that, although the prohibition of removing a community's sole transmission service is justified, it would consider a waiver of this ban where removal of such a local service might better serve the public interest.¹¹ We believe that the circumstances of this case -- where a publicly funded state-wide educational network is attempting to find the most efficient manner in which to deliver its educational programming to all of its viewers -- justifies a waiver of our allotment policy.

11. In this regard, we note that WUND's existing broadcast service is not inherently local, but rather state-wide in nature. While Columbia and Edenton are, in many respects, different *local* communities, they are similar with respect to the noncommercial educational service offered by UNC throughout North Carolina to its citizens. The Commission has often recognized that noncommercial broadcasters experience unique operational difficulties which warrant special relief from time to time.¹²

¹⁰ In this regard, Hampton Roads states UNC has presented its proposed change of community of license proposal as an effort to merely correct a technicality in broadcast rules, and that the Columbia area will suffer no loss of a local presence and service.

¹¹ *Reconsideration Order*, 5 FCC Rcd at 7096-7097.

¹² See, e.g., *Nebraska Educational Television Commission*, 4 RR 2d 771 (1965); *Fifth Report and Order, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12847, 12852 (1997), *recon. denied on other grounds*, 13 FCC Rcd 6860 (1998).

12. Because there are no local studio or transmitter site changes proposed here, there will be no disruption of existing over-the-air service provided by WUND. Nor will satellite subscribers in the Greenville DMA be adversely affected by UNC's proposal. We are not presented here with a situation where the proposed change is being constructed to gain a competitive advantage over other local stations -- WUND does not maintain a traditionally local presence operating a local studio and broadcasting locally produced programming as commercial stations are required to do. Rather, UNC seeks to overcome geographic and service anomalies to greater facilitate its state-wide noncommercial educational program service to North Carolina residents. As previously noted, the Commission has traditionally shown great deference to state-wide educational broadcast systems in their efforts to provide and expand noncommercial programming to all of its citizens. Among other things, the Commission has allowed state-wide educational networks to operate with one centralized facility and numerous stations (with main studio waivers) rebroadcasting that programming in local communities throughout the state.¹³ UNC's proposal, in our judgment, is not inconsistent with fostering such state-wide noncommercial educational service.

13. Although we find that the requested waiver is justified, we note -- as did Hampton Roads in its opposition -- that even when more centralized operations for state-wide educational networks are allowed, the Commission has not relieved them of their local service obligations. Thus, we will require UNC to establish its public inspection file for WUND in both communities, and to maintain a toll-free telephone number so that residents of both communities are able to contact UNC without incurring charges. We also encourage UNC to engage in and maintain dialogue with residents of both communities and to make widely known the means for contacting UNC with input regarding its broadcast service. Moreover, we want to make clear that our decision herein is based on the special facts of this case and the narrow public interest grounds of accommodating a state-wide educational network, as we have traditionally done in recognition of their special role in providing educational broadcasting to all of its citizens.

14. Accordingly, IT IS ORDERED THAT the petition for Rule Making (RM-10802) filed by the University of North Carolina, IS GRANTED to the extent indicated herein.

15. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS FURTHER ORDERED, That effective September 6, 2005, the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

¹³ *Nebraska Educational Television Commission, supra.*

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Amended</u>
Columbia, North Carolina	*2	--
Edenton, North Carolina	--	*2

16. Furthermore, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS FURTHER ORDERED, That effective September 6, 2005, the DTV Table of Allotments, Section 73.622(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Amended</u>
Columbia, North Carolina	*20	--
Edenton, North Carolina	--	*20

17. IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the authorization of the University of North Carolina for station WUND-TV, channel *2, and paired digital channel *20, Columbia, North Carolina, IS MODIFIED to specify operation on channel *2 and paired digital channel *20, at Edenton, North Carolina, subject to the following conditions:

- (a) Within 45 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 340), specifying the new facility;
- (b) Nothing contained herein shall be construed as a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

18. IT IS FURTHER ORDERED, That the Commission will send a copy of this Order in a report to be sent to Congress and the Government Accountability Office (GAO) pursuant to the Congressional Review Act.¹⁴

19. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

20. The Commission has determined that the relevant provisions of the Regulatory

¹⁴ See 47 U.S.C. § 801(a)(1)(A).

Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606.¹⁵

21. For further information concerning this proceeding, contact Clay C. Pendarvis, Media Bureau, (202) 418-1600.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁵ See *Certifications that Section 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making To Amend Sections 72.202(b), 73.504, and 73.606(b) of the Commission's Rules*, 46 FR 11549 (February 9, 1981).